Supreme Court, U. S.
FILED
SEP 1 1979
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-355

JULIO CABRERA SANCHEZ,

Petitioner,

versus

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

JULIO CABRERA SANCHEZ,
Petitioner,

versus

THE STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

The petitioner Julio Cabrera Sanchez respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas; that opinion was rendered on February 12, 1979.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, reported in 582 S.W.2d 813, appears in the Appendix to this petition. The motion for rehearing was denied without written opinion.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on February 12, 1979. A timely petition for rehearing *en banc* was denied on June 6, 1979, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether a peace officer may, under the Fourth Amendment to the Constitution of the United States, search, without warrant, the locked trunk compartment of an automobile which has been taken into police custody and secured at the station house, when the search was not pursuant to any standard police procedure of the law enforcement agency.

2. Whether the principles enunciated in *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 99 S.Ct. 2586 (1979), extend to protect the Fourth Amendment privacy interests in the locked trunk compartment of an automobile which has been taken into police custody and searched by a peace officer in the absence of a standard policy or procedure for doing so.

3. Whether the initial detention and arrest of petitioner were based on less than the probable cause required by the Fourth Amendment to the Constitution of the United States.

4. Whether a state appellate court may justify a detention by providing, for the first time on appeal, an *ex post facto* reason for the arrest, when that reason was not articulated by the arresting officer.

STATUTORY PROVISIONS INVOLVED

United States Const., Amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Const., Amend. XIV, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Penal Code, Ann., Sec. 42.08:

(a) An individual commits an offense if he appears in a public place under the influence of alcohol or any other substance, to the degree that he may endanger himself or another.

(b) A peace officer or magistrate may release from custody an individual arrested under this section if he believes imprisonment is unnecessary for the protection of the individual or others.

(c) It is a defense to prosecution under this section that the alcohol or other substance was administered for therapeutic purposes by a licensed physician.

(d) An offense under this section is a Class C misdemeanor.

Tesas Code of Crim. Proc. Ann., Art. 2.12:

See Appendix

Texas Code of Crim. Proc. Ann., Art. 14.01:

(a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed

as a felony or as an offense against the public peace.

(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

Texas Code of Crim. Proc. Ann., Art. 37.09:

An offense is a lesser included offense if:

(1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

(2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission.

(3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or

(4) it consists of an attempt to commit the offense charged or an otherwise included offense.

Texas Civil Stat. Ann., Art. 6701d, Secs. 140-142:

See Appendix

Texas Civil Stat. Ann., Art. 6701*l*-1:

> Any person who drives or operates an automobile or any other motor vehicle upon any public road or highway in this State, or upon any street or alley within the limits of an incorporated city, town or village, while such person is intoxicated or under the influence of intoxicating liquor, shall be guilty of a misdemeanor and upon conviction shall be punished by confinement in the county jail for not less than three (3) days nor more than two (2) years, and by a fine of not less than Fifty ($50.00) Dollars nor more than Five Hundred ($500.00) Dollars. Provided, however, that the presiding judge in such cases at his discretion may commute said jail sentence to a probation period of not less than six (6) months.

STATEMENT OF THE CASE

On October 20, 1975, Border Patrol Agents Melton and Weinbrenner were on routine patrol on Highway 57 in Frio County, Texas. (Record of Motion to Suppress, pages 3-5, hereinafter abbreviated as, e.g., RMS 3-5.) At approximately 1:30 A.M., they were parked adjacent to the intersection of Highway 57 and Highway 140[1] in an attempt to intercept the possible smuggling of aliens. (RMS 5-6) Their attention was attracted to a

1 This is approximately ninety highway miles from the border of Texas and Mexico.

vehicle travelling away from the border on Highway 57 at a high rate of speed. (RMS 7) The agents were unable to see the driver clearly or determine the make or model of the vehicle; however, the rear of the vehicle appeared to be heavily loaded, which led the agents to believe that the car might contain illegal aliens. (RMS 7-8, 17; Record, page 54, hereinafter abbreviated, e.g., as R 54.)

As a result, the agents pursued the vehicle at speeds in excess of eighty miles an hour but could not catch it. (RMS 8) They then came upon the petitioner, who was standing beside a vehicle and looking under its upraised hood. (RMS 9, 17)

Agent Melton parked his car behind petitioner's vehicle and approached the petitioner, who appeared to be adjusting the carburetor of his car. (RMS 9) Melton smelled alcohol on petitioner's breath but did not at that point attempt to detain or arrest the petitioner. (RMS 9) He did later testify that petitioner was not free to leave at that time. (RMS 20) Melton identified himself and ascertained that petitioner was a citizen of the United States. (RMS 9, 19)

Melton then looked in the back seat of the car and determined that, although beer cans were visible, there was no one in the car. (RMS 9, 11) Next, Melton asked if he could look in the trunk of petitioner's car and was told he could not. (RMS 9-10, 19-20)

Petitioner then "started" to drive away, but before he could do so, Melton asked him to step out of his car; this petitioner did. (RMS 10) Petitioner became visibly angry, to which Melton responded by saying that he "just wanted to check in his trunk." (RMS 10) Melton also informed petitioner that Melton believed he had been drinking heavily and should not be driving. (RMS 10) Melton testified that he believed petitioner was intoxicated. (RMS 10-11)

The agents then called the Frio County sheriff, who agreed to come out and assist the agents in making "a determination as to whether or not the subject actually had been drinking." (RMS 11) At this time Melton told petitioner that he was being arrested for driving under the influence of alcohol. (RMS 11)

Petitioner asked to sit in his car. (RMS 11) Before allowing him to do so, Melton looked in the car for weapons; as he did, he noticed a sweet odor which he could not identify. (RMS 12) At that time he found nothing to persuade him that a crime was being committed. (RMS 21)

The sheriff and a deputy then arrived and placed petitioner under arrest for driving while intoxicated. (RMS 12-13, 32) Petitioner was taken to jail, and his car was driven to the jail by the deputy sheriff. (RMS 13, 14)

After the car had been taken to the jail, Melton asked the deputy if he had noticed the odor in the car; the

deputy replied that he had not. (RMS 13) Melton again entered the car and again detected the odor, which he decided, as he approached the rear window of the car, was marihuana. (RMS 13) Melton then shined a flashlight through a "speaker hole" near the back window of the car and "saw a burlap bag of the type used to transport marihuana." (RMS 13, 24-25) Melton concluded at this time that marihuana was in the trunk. (RMS 13) However, because the petitioner had told Melton that he did not have a key to the trunk, Melton was not able to get into the trunk by ordinary means. (RMS 13)

As a consequence, Melton and the deputy sheriff removed the back seat of the car, reached into the trunk area as best they could, and removed a small amount of what the Border Patrol agents concluded was marihuana. (RMS 13, 26) Agent Weinbrenner and the deputy sheriff then opened the trunk with a wrecking bar; inside they found approximately ninety-two pounds of marihuana. (RMS 14)

On cross-examination, Melton stated that he never saw petitioner behind the wheel of the vehicle; he also testified that he never saw petitioner drive the car on a public highway. (RMS 17-18) Agent Weinbrenner testified to like effect at the trial on the merits. (R 25)

Sheriff Benny Sanders testified that he arrested petitioner for driving while intoxicated because of the statements of the Border Patrol agents. (RMS 37) He

also testified that after Melton detected the smell of marihuana in the car, Melton and Weinbrenner and the deputy sheriff informed him of their apparent discovery; to this, the sheriff responded, "go ahead and see" — an indication of his assent to the search of petitioner's trunk compartment. (RMS 32-33)

Petitioner was subsequently indicted for possession of more than four ounces of marihuana, a felony. (R 2) He filed a timely motion to suppress the evidence obtained as a consequence of the allegedly illegal arrest and search, and evidence was heard on the motion prior to trial. (R 4-5, RMS 1-50) The court overruled the motion to suppress as well as petitioner's timely trial objection, thus preserving the alleged error for review. (R 41, 43, 48) *See, Riojas v. State,* 530 S.W.2d 298, 301 (Tex. Crim. App. 1975). After a trial before the court, petitioner was found guilty and sentenced to serve four years in the Texas Department of Corrections. (R 19, 22) His appeal to the Texas Court of Criminal Appeals followed, in which the only disputed issue was the validity of petitioner's detention and arrest, and the search of the trunk compartment of his vehicle. *Sanchez v. State,* 582 S.W.2d 813 (Tex. Crim. App. 1979).

On appeal the Texas court held that the detention of petitioner by the Border Patrol agents was valid — even though they were not peace officers under Texas law — because, In Texas, private citizens may arrest others for the offense of public intoxication. The court also held that under the circumstances of this case, the

various officers had probable cause to search petitioner's automobile; therefore, even though the trunk compartment was locked and secured in their custody at the county jail, no search warrant was necessary. Finally, the appellate court held that defensive testimony as to the presence of speakers in the "speaker holes" of petitioner's automobile was not conclusive as to the validity of the search.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With This Court's Opinions In *UNITED STATES v. CHADWICK,* 433 U.S. 1 (1977), And *ARKANSAS v. SANDERS,* 99 S.Ct. 2586 (1979).

In *United States v. Chadwick,* 433 U.S. 1 (1977), the Court held that a warrant must be obtained — even though probable cause be present — when a locked footlocker is taken from the open trunk compartment of a suspect's automobile and placed securely in police custody. In *Arkansas v. Sanders,* 99 S.Ct. 2586 (1979), *Chadwick* was cited as the Court invalidated a similar search of an unlocked suitcase. Petitioner contends that the Fourth Amendment principles which invalidated the searches of the closed containers in *Chadwick* and *Sanders* should also provide protection for those who place personal effects in the locked trunk compartments of their automobiles.

The trunk of an automobile, when compared to the other parts of the vehicle, does not share in the

"diminished expectation of privacy which surrounds the automobile." *United States v. Chadwick*, supra, at 12. It is in the main designed to be the temporary repository of one's personal effects, as is the suitcase. Its interior is not ordinarily in plain view. And, in one state at least, the annual inspection of vehicles does not extend to the interior of the trunk compartment. VERNON'S TEXAS CIVIL STATUTES, ART. 6701d, Secs. 140-142. (Appendix, pp. 8a-22a) Moreover, it is common knowledge that automobiles are equipped with two distinguishable keys, one of which is used exclusively for the trunk compartment. *See generally, United States v. Chadwick*, supra, at 12-13.

Finally, it should be observed that the personal effects which are placed in an automobile's trunk compartment are often contained, not in sealed suitcases and footlockers, but in open containers, such as bags and baskets. It is respectfully contended that private possessions placed in such containers, and then locked in the trunk of an automobile, constitute precisely the type of personal effects protected by the Fourth Amendment.

2. The Case Before The Court Presents An Important Exception To The Court's Holding In *CADY v. DOMBROWSKI*, 413 U.S. 433 (1973).

In *Chambers v. Maroney*, 399 U.S. 42 (1970), the Court held that the warrantless search of the interior of an

automobile at the police station was valid under circumstances in which probable cause existed for both the arrest of the suspect and the search of his car at the scene of his arrest. In *Cady v. Dombrowski*, 413 U.S. 433 (1973), relying in part upon *Chambers*, this Court upheld the warrantless search of the trunk compartment of Dombrowski's automobile even though no probable cause existed for the search. The intrusion was justified as part of the normal caretaking procedures of the local police. *Accord, South Dakota v. Opperman*, 428 U.S. 364 (1976).

In *Dombrowski*, the Court emphasized two factual considerations in determining that the search was not unreasonable. The first, also present in petitioner's case, was that the police had already taken custody of the suspect's vehicle for reasons of safety: the suspect appeared intoxicated and the vehicle might have proved to be a nuisance along the highway. 413 U.S., at 442-443.

However, the second important factual bastion of *Dombrowski* is not present in petitioner's case: in the record of this case there is no testimony or other evidence that the search of the trunk compartment was part of any normal procedure or inventory to protect the police and public. *Cf., South Dakota v. Opperman*, supra, at 369. Instead, the search was instituted solely to ferret out suspected criminal activity. In such a case it is essential to have the protection of a decision made by a

neutral and detached magistrate, especially where — as here — there is no evidence that the vehicle was in danger of being taken away or in any way vandalized. *See, Coolidge v. New Hampshire,* 403 U.S. 443 (1971).

It is important to distinguish between this case on the one hand, and the *Chambers/Cady* line of cases on the other. In *Arkansas v. Sanders,* supra, at 2589, the Court observed that courts and law enforcement officials often find it difficult to draw the careful distinctions which a proper interpretation of the Fourth Amendment requires. The Court then suggested that its recent decision in *Chadwick* was an example of how such difficulties may be intensified by the necessarily small factual differences between cases which sometimes make large differences in the application of the law.

Petitioner respectfully contends that this Court's recent holdings in *Chadwick* and *Sanders* suggest the need for determining whether the warrantless search of the locked trunk in this case was valid under the Fourth Amendment.

3. The Initial Detention Of Petitioner By The Border Patrol Agents Was Without Probable Cause.

In the instant case, both Border Patrol agents testified — Melton at the hearing on the motion to suppress and Weinbrenner at trial on the merits. Neither was able to identify the make or model of the vehicle

which sped past them, nor was either able to see the person who was driving; all that was noticeable was that the vehicle seemed loaded down in the rear and had only one person visible in it. (RMS 7-8, 17; R 54)

Neither officer testified to facts which showed that the car they originally saw speeding past them was the car in petitioner's possession several miles down the road. Nor was either officer able to say that petitioner was the man in the passing car. It thus appears that the agents simply stopped the first car they came upon after their pursuit of the speeding vehicle proved fruitless. This amounts to no probable cause at all. *Compare, United States v. Brignoni-Ponce,* 422 U.S. 873 (1975); *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973).

Nor can it be argued that the agents stopped to assist an apparently stricken motorist. *Compare, Legall v. State,* 463 S.W.2d 731 (Tex. Crim. App. 1971). There is no evidence in the record to support such an argument.

In addition, petitioner contends that probable cause to stop and detain is not satisfied where Border Patrol agents, ninety miles from the Mexican border, see nothing more than a vehicle speeding back from Mexico, at the end of a long weekend,[2] with a loaded trunk. See, *United States v. Brignoni-Ponce,* supra; *Almeida-Sanchez v. United States,* supra.

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2 As the Court may judicially notice, October 20, 1975, was a Monday. Petitioner was detained by the agents shortly after midnight.

It was solely because of this unlawful detention that petitioner was arrested for driving while intoxicated. The record contains no evidence that the agents still suspected petitioner of illegally transporting aliens.

Thus, the illegal detention led directly to the arrest for driving while intoxicated. And, because the search of petitioner's trunk was the direct and almost immediate product of the arrest, it must be concluded that the search was the undiminished fruit of the illegal detention. Hence, the search was illegal, in violation of the Fourth Amendment, made applicable to the states through the Fourteenth. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Davis v. Mississippi*, 394 U.S. 721 (1969).

4. The Arrest Which Led Directly To The Search Of Petitioner's Trunk Compartment Was Illegal Under Texas Law.

Under Texas law, Border Patrol agents are not peace officers. TEX. CODE CRIM. PROC. ANN., Art. 2.12. *Luera v. State*, 561 S.W.2d 497, 500 (Tex. Crim. App. 1978). One who is not a peace officer may arrest another without a warrant only for a felony or an offense against the public peace. TEX. CODE CRIM. PROC. ANN., Art. 14.01.

The offense of driving while intoxicated is a misdemeanor. TEXAS CIV. STAT. ANN., Art. 6701*l*-1. Under the 1925 Texas Penal Code, driving while intoxicated could not be classified as an offense against

the public peace because only those offenses contained in Title 9 (titled "Offenses Against the Public Peace") of that Code were such offenses. *Cook v. State*, 155 Tex. Crim. R. 580, 238 S.W.2d 200 (1951). The driving while intoxicated statute was then contained in Title 13 of that Code.

On January 1, 1974, a new Texas Penal Code became effective. There is no portion of the Code titled "Offenses Against the Public Peace." However, the subject matter of virtually all of the statutes contained in Title 9 of the 1925 Code is now contained in Title 9 of the 1974 Code, which is titled "Offense Against Public Order and Decency." Petitioner submits that the Texas courts would construe offenses against the public peace to be those contained in Title 9 of the 1974 Code. It follows that the Border Patrol agents were not authorized to detain or arrest petitioner for driving while intoxicated. The fruit of their unlawful detention and arrest was the search of the trunk of petitioner's car.

5. Both The Fourth And Fourteenth Amendments Are Violated When A State Appellate Court Justifies A Search By Holding That It Was The Fruit Of An Arrest That Was Not Made But Which Could Have Been Made.

The Texas court did not hold that the Border Patrol agents were authorized to detain or arrest petitioner

for driving while intoxicated. Instead, the court apparently held that, since the agents *could have* arrested petitioner for public intoxication, the detention was proper. 582 S.W.2d, at 814-815.

A search may not be justified by what it produces. *Ker v. California,* 374 U.S. 23, 40-41 (1963). *United States v. Di Re,* 332 U.S. 581, 595 (1948). As the Texas court itself has said, a search may not be justified by "after-acquired facts." *Taylor v. State,* 421 S.W.2d 403, 406 (Tex. Crim. App. 1967), *cert den.* 393 U.S. 916 (1968).

There is no evidence that the agents, or any other officer, ever arrested petitioner for public intoxication, formerly an "offense against the public peace" and now — since January 1, 1974, an "offense against public order and decency." This is an after-acquired fact used to justify the search, in violation of the Fourth Amendment, and also in violation of the Fourteenth Amendment's guarantee of due process of law. What an officer might have done, or could have done, should not be utilized to uphold an otherwise invalid search. *Compare, United States v. Chadwick,* supra, at 15-16 (what a magistrate probably would have done not available to uphold search).

Nor can it be argued that the hypothetical arrest for public intoxication was valid because that offense is a lesser included offense of the offense of driving while intoxicated. The Texas court has held that an offense is not a lesser included offense of another if it contains a

necessary element not required as part of the proof of the allegedly greater offense. TEX. CODE CRIM. PROC. ANN., Art. 37.09; *Lasker v. State,* 573 S.W.2d 539 (Tex. Crim. App. 1978); *Garcia v. State,* 571 S.W.2d 896 (Tex. Crim. App. 1978); *Bayona v. State,* 544 S.W.2d 155 (Tex. Crim. App. 1976).

The Texas court has held that a necessary element of public intoxication is the requirement that the actor may be a danger to himself or another. *Dickey v. State,* 552 S.W.2d 467 (Tex. Crim. App. 1977). This is not an element of driving while intoxicated. *Ex parte Ross,* 522 S.W.2d 214 (Tex. Crim. App. 1975). Public intoxication may not therefore be a lesser included offense of driving while intoxicated.

Petitioner therefore contends that his right to due process and to be free of unreasonable searches and seizures has been violated.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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September 4, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to Mark White, Esq., Attorney General of Texas, Box 12548, Capitol Station, Austin, Texas 78711, and to Alger Kendall, Jr., District Attorney, 81st Judicial District, 3rd Floor, Karnes County Courthouse, Karnes City, Texas 78118, as Counsel for Respondent. I further certify that all parties required to be served have been served.

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APPENDIX

Julio Cabrera Sanchez,
Appellant,

versus

The State of Texas,
Appellee.

No. 55657

Court of Criminal Appeals of Texas,
Panel No. 3.

Feb. 21, 1979.

Rehearing En Banc Denied June 6, 1979.

Before DOUGLAS and TOM G. DAVIS, JJ., and WILLIAM J. CORNELIUS, Commissioner.

OPINION

WILLIAM J. CORNELIUS, Commissioner.

In a jury trial, Julio Sanchez was convicted of the offense of possession of more than four ounces of marihuana, a third degree felony. Punishment was set at four years confinement.

The sufficiency of the evidence is not challenged. Sanchez's sole ground of error is that the trial court

should have granted his motion to suppress evidence of the contraband because it was obtained by an illegal search.

At about 1:30 a. m. on the day in question, United States Border Patrol Agents Melton and Weinbrenner observed a vehicle traveling on Highway 35 at a high rate of speed. Only one person was in the automobile. The officers gave chase but were unable to overtake the vehicle. A few minutes later they came upon the same car stopped on the highway. Sanchez was at the front of the automobile looking under the hood. The officers asked what was wrong and he answered that he was having carburetor trouble. The officers smelled a strong odor of alcohol and decided that Sanchez was intoxicated. They had also noticed that his automobile trunk appeared to be heavily loaded, and they asked if he would allow them to look in the trunk. He refused. The officers then detained him and called the sheriff's department. Shortly thereafter, Sheriff Deputies Sanders and Martinez arrived. They arrested Sanchez and took him to the sheriff's office. Agent Melton testified that, while waiting for the deputies to arrive, he allowed Sanchez to sit in the back seat of the automobile in order to keep warm, and that as he opened the door to let Sanchez in the automobile he smelled a sweet, musty odor which he could not smell in the front seat. When they arrived at the sheriff's department headquarters, Sanchez was charged with the offense of driving while intoxicated. Agent Melton told Deputy Martinez of the smell which he had noticed, and they examined the back seat of the car with the aid of a flashlight. Through two stereo speaker holes in the

back of the car, they could see something behind the seat in the trunk which looked like large burlap bags which are commonly used to transport marihuana. They forcibly opened the trunk and discovered that the bags contained approximately five kilo bricks of marihuana. The trial court overruled the motion to suppress.

Sanchez attacks the validity of the search on several grounds. First, He asserts that his detention was illegal because the United States Border Patrol agents, not being Texas peace officers,[1] did not have the authority to arrest or detain him except for an offense against the immigration laws. We overrule this contention. The border patrolmen did not stop Sanchez. They did, however, detain him after they encountered him stopped on the highway. They testified that, based upon the smell of alcohol and the suspect's actions, it was their opinion that he was intoxicated. Public drunkenness, to the extent that one may endanger himself or another, is an offense against the public peace. V.T.C.A., Penal Code, Sec. 42.08; *Heck v. State*, 507 S.W.2d 737 (Tex. Cr. App. 1974); *McEathron v. State*, 163 Tex.Cr.R. 619, 294 S.W.2d 822 (1956). A private citizen may, without warrant, arrest a person found drunk in a public place. Art. 14.01, V.A.C.C.P.; *Heck v. State*, supra; *McEathron v. State*, supra. Sanchez's detention by the border patrolmen until they could deliver him to the duly constituted police officers of Frio County was proper.

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1 Art. 212, V.A.C.C.P. The statute was amended by the 65th Legislature to provide that U.S. Border Patrolmen, although not peace officers of the State, shall have the power of arrest, search and seizure as to felony offenses only.

Officer Melton had observed that the trunk of Sanchez's automobile appeared to be heavily loaded. Before going to the sheriff's office he noticed, in the vehicle's rear, an odor of a substance which he later decided was marihuana. When the officers arrived only a few minutes later at the sheriff's department, Patrolman Melton advised Deputy Martinez of the odor. Together they looked into the back seat and saw, through the speaker holes, burlap bags of the type commonly used to transport marihuana. Those circumstances were sufficient to constitute probable cause to search the trunk of the automobile. It was not necessary that exigent circumstances exist. The fact that the automobile was being held at the sheriff's department and could have been held there long enough to secure a warrant before conducting the search does not make the search unlawful or unreasonable. *Texas v. White*, 428 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209, reh. den., 423 U.S. 1081, 96 S.Ct. 869, 47 L.Ed.2d 91 (1975); *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, reh. den., 400 U.S. 856, 91 S.Ct. 23, 27 L.Ed.2d 94 (1970). For constitutional purposes, there is no difference between seizing and holding an automobile while securing a search warrant and in conducting an immediate search without a warrant. If probable cause to search exists, either course is reasonable under the Fourth Amendment. *Chambers v. Maroney*, supra.

Lastly, it is argued that the motion to suppress should have been granted because defense testimony

proved that the speakers in the rear of the automobile were in place, both before and after the search, thus casting doubt upon the officers' testimony that they saw the burlap bags through the speaker holes. We cannot agree. There was no conclusive proof that the speakers were in place at all times, or at the very time of the search. The conflicts in the testimony were for the resolution of the trial judge, and his findings of the facts will not be overturned if they are supported by sufficient evidence. Furthermore, it was not necessary that the officers be able to see into the trunk for the search to be justified. The smell of marihuana in the rear of the automobile, coupled with an absence of any contraband in view in the back seat, would have been sufficient probable cause, under all of the circumstances here, to justify a search of the trunk.

The judgment of the trial court is affirmed.

Opinion approved by the Court.

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 55,657 styled:

JULIO CABRERA SANCHEZ,
Appellant,

versus

THE STATE OF TEXAS,
Appellee.

the judgment of the 81ST, JUDICIAL DISTRICT Court of FRIO County, Texas was affirmed on FEBRUARY 21, 1979, on JUNE 6, 1979 the appellant's motion for rehearing en banc was denied and on JUNE 8, 1979 the mandate of this Court issued.

THEREFORE, WITH THE DENYING OF THE APPELLANT'S MOTION FOR REHEARING EN-BANC this cause was disposed of by this Court on JUNE 8, 1979, the appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

WITNESS my hand and the seal of said Court, at my office in Austin, Texas this the 8TH day of JUNE, A. D. 1979.

/s/ THOMAS LOWE
THOMAS LOWE, Clerk of
the COURT OF
CRIMINAL
APPEALS OF TEXAS

TEXAS CODE OF CRIM. PROC. ANN., Art. 2.12
(as effective on October 20, 1975):

The following are peace officers:

(1) sheriffs and their deputies;

(2) constables and deputy constables;

(3) marshals or police officers of an incorporated city, town, or village;

(4) rangers and officers commissioned by the Public Safety Commission and the Director of the Department of Public Safety;

(5) investigators of the district attorneys', criminal district attorneys', and county attorneys' offices;

(6) law enforcement agents of the Alcoholic Beverage Commission;

(7) each member of an arson investigating unit of a city, county or the state;

(8) any private person specially appointed to execute criminal process;

(9) officers commissioned by the governing board of any state institution of higher education, public junior college or the Texas State Technical Institute;

(10) officers commissioned by the Board of Control;

(11) law enforcement officers commissioned by the Parks and Wildlife Commission;

(12) airport security personnel commissioned as peace officers by the governing body of any political subdivision of this state that operates an airport served by a Civil Aeronautics Board certificated air carrier; and

(13) municipal park and recreational patrolmen and security officers.

TEXAS CIVIL STAT. ANN.,
ART. 6 6701d, SECS. 140-142:

ARTICLE XV — INSPECTION OF VEHICLES

Sec. 140. (a) Every owner of a motor vehicle, trailer, semitrailer, pole trainer, or mobile home, registered in this state and operated on the highways of this state, shall have the tires, brake system (including power brake unit), lighting equipment, horns and warning devices, mirrors, windshield wipers, front seat belts in vehicles where seat belt anchorages were part of the manufacturer's original equipment on the vehicle, steering system (including power steering), wheel assembly, safety guards or flaps if required by Section 139A of this Act, exhaust system, and exhaust emis-

sion system inspected at state-appointed inspection stations or by State Inspectors as hereinafter provided. Provisions relating to the inspection of trailers, semitrailers, pole trailers, or mobile homes shall not apply when the gross weight of such vehicles and the load carried thereon is four thousand (4,000) pounds or less. Only the mechanism and equipment designated in this section may be inspected, and the owner shall not be required to have any other equipment or part of his motor vehicle inspected as a prerequisite for the issuance of an inspection certificate.

(b) If such inspection discloses the necessity for adjustments, corrections, or repairs, the vehicle shall be adjusted, corrected, or repaired before a certificate is issued as hereinafter provided. The owner may have such adjustments, corrections, ore repairs made by such qualified person or persons as he may choose, subject to reinspection as hereinafter provided.

(c) Official inspection stations appointed and supervised by the State of Texas shall make all inspections pursuant to the provisions of this Section, except as provided in subdivision (d) hereof. The Department shall cause one (1) inspection to be made in the year commencing with the effective date of this Act, and annually thereafter. If the motor vehicle, trailer, semitrailer, pole trailer or mobile home, registered in this State, is damaged to the apparent extent that it would require repair before passing state inspection, the investigating officer shall remove the inspection certifi-

cate from the vehicle windshield and shall give the operator of the vehicle a dated receipt. Within thirty (30) days of the date indicated on the receipt, the vehicle shall be reinspected. The periods of inspection shall be fixed by the Department, provided, however, that at no time shall a certificate of inspection or a receipt for a certificate of inspection be required or demanded as a condition precedent to securing a license plate for any motor vehicle, regardless of any period or periods of inspection as may be fixed by the Department. The Department shall have power to make rules and regulations, not inconsistent with law, with respect to the periods of inspection.

(d) The Department may, in its discretion, permit inspection as herein provided to be made by State inspectors under such terms and conditions as the Department may prescribe. Provided, however, the Department may authorize the acceptance in this State of a certificate of inspection and approval issued in another state having a similar inspection law and may extend the time within which a certificate shall be obtained by the resident owner of a vehicle which was not in this State during the time an inspection was required.

(e) After the fifth (5th) day following the expiration of the period designated for the inspection, no person shall operate on the highways of this State any motor vehicle registered in this State unless a valid certificate of inspection is displayed thereon as required by

this Section. It is a defense to a prosecution under this Section that a valid inspection permit for the vehicle is in effect at the time of the arrest. Any peace officer of the Department of Public Safety, or any sheriff or deputy sheriff, or any City policeman who shall exhibit his badge or other signs of authority, may stop any vehicle not displaying this inspection certificate as required by the Department and require the owner or operator to produce an official inspection certificate for the Vehicle being operated.

(f) All motor-assisted bicycles shall be subject to annual inspection in the same manner as are motorcycles, except (1) the fee for inspection shall be Two Dollars ($2.00), One Dollar ($1.00) of which shall be paid to the Department to be placed in the Motor Vehicle Inspection Fund and used for the purposes prescribed by law, and (2) the only items of equipment required to be inspected are the brakes, headlamps, and reflectors, which are required to comply with the standards prescribed in Section 184 of this Act. The Department shall promulgate rules and regulations relating to the inspection of motor-assisted bicycles and the issuance and display of inspection certificates with respect to those vehicles.

(g) Any person operating a vehicle on the highways of this State, other than a vehicle licensed in another State and being temporarily and legally operated under a valid reciprocity agreement, in violation of the provisions of this Act or without displaying a valid inspec-

tion certificate or having equipment which does not comply with the provisions of Article XIV of this Act is guilty of a misdemeanor and on conviction shall be punished as provided in Section 143 of this Act.

* * *

State appointed inspection stations

Sec. 141. (a) The Department may establish state-appointed inspection stations to carry out the provisions of this Section. Such stations may be located anywhere in the state, and should any be established or appointed, there shall be at least one (1) for each county. The Department is authorized to furnish instructions to, and to supervise official inspection stations and mechanics for inspection of motor vehicles, trailers, semi-trailers, pole trailers, and mobile homes for the proper and safe performance of the required items of inspection. The certification of persons to inspect vehicles shall be in accordance with the rules and regulations promulgated by the Department. Every person desiring to operate as an official inspection station shall file an application for a certificate of appointment with the Department.

The application shall be made upon a form prescribed and furnished by the Department, and shall set forth the name of the applicant, the name under which the applicant transacts or intends to transact business, the location of his place of business within the state,

and such other information as the Department may require. If the applicant has or intends to have more than one place of business within the state, a separate application shall be made for each place of business.

If the applicant is an association, the application shall set forth the names and addresses of the persons constituting the association, and if a corporation, the names and addresses of the principal officers thereof, and any other information prescribed by the Department for purposes of identification. The application shall be signed and verified by oath or affirmation by the owner, if a natural person; in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached written evidence of his authority.

Only such locations which fulfill the Department's requirements and whose owners or proprietors comply with Department regulations shall qualify and be appointed and issued a certificate. Upon approval of an application, the Department shall issue to the owner a certificate of appointment as an official inspection station for the place of business within the state set forth in the application.

Certificates of appointment shall not be assignable, and shall be valid for the owners in whose names issued and for the transaction of business at the place designated therein, and shall at all times be conspicuously displayed at the place for which issued.

An applicant for appointment as an inspector shall submit with his first application a certificate fee of Five Dollars ($5). An individual's first appointment as an inspector is effective until August 31 of the year following the date of appointment. Thereafter, appointments as inspectors shall be made for one-year periods, and the certificate fee for each year shall be Five Dollars ($5).

Upon being advised that an application will be approved, an applicant for an appointment as an inspection station shall pay a fee of Thirty Dollars ($30) which shall constitute the certificate fee until August 31st of the odd-numbered year following the date of appointment. Thereafter, appointments of stations shall be made for two-year periods and the certificate fee for each such period shall be Thirty Dollars ($30). All certificate fees shall be placed in a fund in the State Treasury to be known as the Motor Vehicle Inspection Fund and shall be used by the Department in the administration of this Act.

(b) Any owner of an official inspection station who by himself, agent, servant, or employee, violates any provision of Section 140, 141, or 142 of this Act, or requires the repair of any mechanism or equipment other than that set forth in the uniform standards of safety items to be inspected as established, shall upon conviction, be punished by a fine not exceeding Two Hundred Dollars ($200).

(c) The fee for compulsory inspection to be made under this Section shall be Four Dollars ($4.00). One Dollar ($1.00) of each fee shall be paid to the Department and shall be placed in the Motor Vehicle Inspection Fund for the purpose of paying the expense of the administration of this law. The Department may require each official inspection station to make an advance payment of One Dollar ($1.00) for each inspection certificate furnished to it, and the money so received shall be placed in the Motor Vehicle Inspection Fund, and no further payment to the Department shall be required upon issuance of the certificate. If such advance payment has been made, the Department shall refund to the inspection station the amount of One Dollar ($1.00) for each unissued certificate which the inspection station returns to the Department in accordance with rules and regulations promulgated by the Department.

If an inspection disclosed the necessity for adjustments, corrections, or repairs, such vehicle shall be reinspected once within seven (7) days free of charge at the same inspection station after the adjustments, corrections, or repairs have been made. Any such vehicle under the terms of this Act, if involved in an accident subsequent to the required inspection, which accident affects the safe operation of any item of inspection, shall return to an inspection station after adequate repairs are made. The subsequent inspection shall be as if the vehicle had not been inspected before. The inspection fee shall be charged for reinspection.

(d) No certificate of inspection shall be issued by any inspector or inspection station until the vehicle has been inspected and found to be in proper and safe condition and to comply with the uniform standards of safety, inspection rules and regulations, and laws of this state. No person shall make, issue, or knowingly use an imitation or counterfeit of an official inspection certificate.

No person shall display or cause or permit to be displayed any inspection certificate knowing the same to be fictitious or issued for another vehicle or issued without the required inspection having been made. No person may transfer an inspection certificate from one windshield or location to another windshield or location.

No person shall perform an inspection or issue an inspection certificate without such person first having been certified to do so by the Department.

No person shall drive or move on any highway any motor vehicle, trailer, semi-trailer, pole trailer, mobile home, or combination thereof unless the equipment upon any and every said vehicle is in good working order and adjustment as required in this Act and said vehicle is in such safe mechanical condition as not to endanger the driver or other occupant or any person or property.

(e) The Department may appoint as official inspection stations, for the limited purpose of inspecting vehicles owned by political subdivisions and agencies of the state, vehicle maintenance facilities owned and operated by the political subdivisions or agencies. The political subdivisions and agencies may not be required to pay the vehicle-inspection fee provided for in Subsection (c) of this section, but shall pay to the Department an advance payment of One Dollar ($1.00) for each inspection certificate issued to it. The funds received by the Department shall be placed in the Motor Vehicle Inspection Fund for the purpose of paying the expense of the administration of this Act. Inspection stations appointed under this subsection must satisfy all requirements set forth in Sections 140, 141, and 142 of this Act except the provisions relating to the fee contained in Subsection (a) of this section. No officer, employee, or inspector of any political subdivision or agency shall place or cause to be placed any inspection certificate received from the Department under the provisions of this subsection on any vehicle other than a vehicle owned by the political subdivision or agency.

(f) The Director may deny an application for a license or revoke or suspend an outstanding certificate of any inspection station or the certificate of any person to inspect vehicles, in addition to action taken under Subsection (g) of this section, for any of the following reasons:

(1) issuing a certificate without required adjustments, corrections, or repairs having been made when

an inspection disclosed the necessity for those adjustments, corrections, or repairs;

(2) refusing to allow the owner of the vehicle to have required corrections or adjustments made by any qualified person he may choose;

(3) issuing an inspection certificate without having made an inspection of the vehicle;

(4) knowingly or willfully issuing an inspection certificate for a vehicle without the required items of inspection or with items which were not at the time of issuance in good condition and in conformity with the laws of this state or in compliance with rules of the Commission;

(5) failure to charge the required fee for inspection;

(6) charging more than the required inspection fee;

(7) issuing an inspection certificate without being certified to do so by the Department;

(8) proof of unfitness of applicant or licensee under standards set out in this Act or in Commission rules;

(9) material misrepresentation in any application or any other information filed under this Act or Commission rules;

(10) willful failure to comply with this Act or any rule promulgated by the Commission under the provisions of this Act;

(11) failure to maintain the qualifications for a license; or

(12) any act or omission by the licensee, his agent, servant, employee, or person acting in a representative capacity for the licensee which act or omission would be cause to deny, revoke, or suspend a license to an individual licensee.

When there is cause to deny an application for a certificate of any inspection station or the certificate of any person to inspect vehicles or revoke or suspend the outstanding certificate, the Director shall, in less than thirty (30) days before refusal, suspension, or revocation action is taken, notify the person, in writing, in person, or by certified mail at the last address supplied to the Department by the person, of the impending refusal, suspension, or revocation, the reasons for taking that action, and of his right to an administrative hearing for the purpose of determining whether or not the evidence is sufficient to warrant the refusal, suspension, or revocation action proposed to be taken by the Director. If, within twenty (20) days after the personal notice of the notice is sent or notice has been deposited in the United States mail, the person has not made a written request to the Director for this administrative hearing, the Director, without a hearing, may suspend

or revoke or refuse to issue any certificate. On receipt by the Director of a written request of the person within the twenty-day (20-day) period, an opportunity for an administrative hearing shall be afforded as early as is practicable. In no case shall the hearing be held less than ten (10) days after written notification, including a copy of the charges, is given the person by personal service or by certified mail sent to the last address supplied to the Department by the applicant or certificate holder. The administrative hearing in these cases shall be before the Director or his designee. The Director or his designee shall conduct the administrative hearing and may administer oaths and issue subpoenas for the attendance of witnesses and the production of relevant books, papers, or documents. On the basis of the evidence submitted at the hearing, the Director acting for himself or upon the recommendation of his designee may refuse the application or suspend or revoke the certificate.

Any person dissatisfied with the action of the Director, without filing a motion for rehearing, may appeal the action of the Director by filing a petition within thirty (30) days after the action is taken in a district court in the county where the person resides or in a district court of Travis County, and the court is vested with jurisdiction, and it shall be the duty of the court to set the matter for hearing upon ten (10) days written notice to the Director and the attorney representing the Director. The court in which the petition of appeal is filed shall determine whether any action of the

Director shall be suspended pending hearing and enter its order accordingly, which shall be operative when served upon the Director, and the Director shall provide the attorney representing the Director with a copy of the petition and order. The Director shall be represented in these appeals by the district or county attorney of the county, or the attorney general, or any of their assistants.

(g) No person who performs an inspection at a state-appointed inspection station may fraudulently represent to an applicant that a mechanism or item of equipment required to be inspected must be repaired, adjusted, or replaced before the vehicle will pass inspection when that is not the case. The Department may cancel or suspend the certificate of appointment of any state-appointed inspection station or the certificate of the person performing the inspection if it finds, after notice and hearing, that a violation of this Section occurred at the inspection station.

Safety standards and inspection certificates

Sec. 142. (a) The Public Safety Commission shall establish uniform standards of safety whenever applicable with respect to items to be inspected as provided by Section 140 of this Act and shall list those items to be inspected in conformity with these standards established as provided by law. The list of items to be inspected and uniform standards of safety shall be posted in every official inspection station. Every vehicle

inspected shall conform in all respects to the uniform standards of safety and the list of items to be inspected established pursuant to this Section.

(b) The Department shall furnish serially numbered certificates of inspection to inspection stations. Each certificate, when issued, shall bear such information as required by the Department for the type of vehicle that was inspected. The certificate shall be invalid after the end of the twelfth month in which the vehicle was last inspected, approved, and the certificate of inspection issued. A certificate of inspection and approval for any vehicle shall be attached to or produced for such vehicle as the Department shall require. The Department shall require that certificates for motorcycles be attached to the rear of the vehicle near the license plate. A record and report as prescribed by the Department shall be made of every inspection and every certificate so issued. No unused certificates of inspection representing a prior inspection period shall be issued after the beginning of the next ensuing period.

(c) The Department may adopt rules necessary for the administration and enforcement of Article XV of this Act.

Supreme Court, U. S.
FILED
DEC 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

* * *

OCTOBER TERM, 1979

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NO. 79-355

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JULIO CABRERA SANCHEZ,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

* * *

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

* * *

OCTOBER TERM, 1979

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NO. 79-355

* * *

JULIO CABRERA SANCHEZ,

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THE STATE OF TEXAS,

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* * *

On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

The State of Texas, Respondent herein, by and through the Attorney General of Texas, respectfully requests that the Court deny the Petition for Certiorari seeking review of a judgment and opinion of the Texas Court of Criminal Appeals, entered on February 12, 1979.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported at 582 S.W.2d 813. As stated by Petitioner, the motion for rehearing en banc was denied without written opinion.

JURISDICTION

Petitioner's jurisdictional statement (Petition for Writ of Certiorari at 2) is acceptable.

QUESTIONS PRESENTED

WHETHER PETITIONER'S INITIAL DETENTION AND ARREST WERE BASED ON PROBABLE CAUSE AS REQUIRED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

WHETHER THE MARIJUANA DISCOVERED IN LARGE BURLAP BAGS INSIDE PETITIONER'S LOCKED AUTOMOBILE TRUNK WAS SEIZED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

STATUTORY PROVISIONS INVOLVED

Petitioner cites and sets forth U.S. CONST. amend IV.; U.S. CONST. amend XIV, §1; TEXAS PENAL CODE ANN. §42.08 (Vernon); TEX. CODE CRIM. PROC. ANN. art. 2.12 (Vernon); TEX. CODE CRIM. PROC. ANN. art. 14.01 (Vernon); TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon); TEX. REV. CIV. STAT. ANN. art. 6701(d), §§140-42 (Vernon); TEX. REV. CIV. STAT. ANN. art. 6701(L-1) (Vernon).

STATEMENT OF THE CASE

The textual portion of Petitioner's statement of the case (Brief of Petitioner at 6-11) is basically adequate.

REASONS FOR DENYING THE WRIT

I. BECAUSE PROBABLE CAUSE EXISTED INITIALLY TO DETAIN PETITIONER, HIS ARREST WAS CLEARLY LEGAL UNDER TEXAS LAW AND WAS NOT IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Petitioner has contended that his detention by Border Patrol agents was in error because the agents not only lacked the legal authority initially to detain Petitioner, but could not properly identify Petitioner's car as the speeding vehicle which had earlier eluded their pursuit. Petitioner has further argued that the agents stopped Petitioner's car because it was the first car they came upon after their fruitless pursuit of the speeding automobile.

Petitioner's allegation is inaccurate. The Border Patrol agents did not "stop" his car; they did, however, detain Petitioner after they encountered him stopped on the highway. At trial both agents testified that, based upon the smell of alcohol present on Petitioner and his suspect actions, it was their opinion that he was intoxicated. Petitioner suggests that because the Border Patrol agents were not "peace officers" as defined by Texas law they had no authority to detain him even after discovering him in an intoxicated state.

Petitioner's argument is wholly without merit. To insist that the Border Patrol agents were bound to allow Petitioner to return to the highway after they had discovered that he was drunk ignores Texas law as well as common sense. As noted by the Texas Court of Criminal Appeals, public drunkenness, to the extent that one may endanger himself or another, is an offense against the public peace. TEX. PENAL CODE ANN. §42.08 (Vernon); *Heck v. State*, 507 S.W.2d 737 (Tex.Crim.App. 1974); *McEathron v. State*, 294 S.W.2d 822 (Tex.Crim.App. 1956). Furthermore, Petitioner's operation of a motor vehicle while intoxicated was a

clear violation of TEX. REV. CIV. STAT. ANN. art. 6701l-1 (Vernon).

Under Texas law, a private citizen may, without warrant, arrest a person found drunk in a public place. TEX. CODE CRIM. PROC. ANN. art. 14.01 (Vernon). *Heck v. State, supra; McEathron v. State, supra.* In Petitioner's case, however, the Border Patrol agents did not actually arrest him, but rather detained him until the arrival of police officers who were "peace officers" under TEX. CODE CRIM. PROC. ANN. art. 2.12 (Vernon). These officers independently determined that Petitioner was intoxicated and consequently arrested him. Petitioner's arrest for driving while intoxicated is not challenged by him. His argument instead centers on his initial detention by the Border Patrol agents. This detention was not only legal, but was commendable in view of Petitioner's impaired driving ability. His allegations concerning his initial detainment and subsequent arrest are without merit and should not be reviewed by this Court.

II. THE MARIJUANA DISCOVERED INSIDE LARGE BURLAP BAGS DURING A SEARCH OF PETITIONER'S LOCKED TRUNK WAS NOT SEIZED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner challenges the constitutional validity of the search and subsequent seizure by law enforcement officials of the marijuana found in the locked trunk of his car. He argues that the seizure was not permissible with the "privacy" guidelines established by this Court in *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, ___ U.S. ___, 99 S.Ct. 2586 (1979). Petitioner further argues that pursuant to the Court's decision in *Cady v. Dombrowski*, 413 U.S. 433 (1973), the

search was unreasonable because it was not pursuant to the normal caretaking or inventory procedures commonly conducted by police in order to protect themselves and the public.

This Court has determined that the probable cause necessary to institute a search is dependent on the "reasonableness" of a seizing officer's belief that the contents of an automobile offend against the law. *Chambers v. Maroney*, 399 U.S. 42, 48 (1970), *quoting Carroll v. United States*, 267 U.S. 132, 158-159 (1925). The reasonableness of a search depends on all the facts and circumstances of each case. In Petitioner's case Border Patrol Agent Melton testified that he had initially observed that the trunk of Petitioner's automobile appeared to be heavily loaded. He further testified that Petitioner refused to open the trunk. Prior to Petitioner's arrest and removal to the sheriff's department, Melton noticed, emanating from the vehicle's back seat, an odor which he decided while driving to the police station was marijuana. Arriving at the sheriff's department headquarters, Agent Melton advised one of the arresting officers, Deputy Martinez, of the odor he had smelled in Petitioner's car. At the station Agent Melton opened the back door of Petitioner's vehicle and again smelled the odor. Then, in cooperation with Deputy Martinez, Melton looked into the back seat area and saw through two existing holes made for stereo speakers, large burlap bags of the type commonly used to transport marijuana. The Texas Court of Criminal Appeals held that these circumstances were sufficient to constitute probable cause to search the trunk of the automobile.

In *Chambers v. Maroney*, the Court held that police officers with probable cause to search an automobile at the scene where it was stopped could constitutionally search the car later at the station house without first obtaining a warrant. In that case, as here, the probable

cause that developed at the scene carried over to the station house. *Chambers v. Maroney, supra*, 399 U.S. at 52. Agent Melton first smelled the odor of marijuana in Petitioner's car at the place on the highway where Petitioner was initially detained and arrested. Only a few minutes elapsed between the initial arrest of Petitioner for driving while intoxicated and the arrival at the police station where Melton was able to verify his suspicions.

Petitioner has contended that Fourth Amendment principles which invalidated searches of closed containers in *United States v. Chadwick* and *Arkansas v. Sanders* should also provide protection for Petitioner and the contents residing in the locked trunk compartment of his automobile. This argument is without merit. This Court has held that "the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property." *Arkansas v. Sanders*, ___U.S.___, 99 S.Ct. at 2591. In addition the Court has repeatedly recognized that the inherent mobility of automobiles often makes obtaining a warrant impracticable. Once seized automobiles are taken from the highway, police are usually held responsible for providing some appropriate location where the automobiles can be kept, with due regard to the safety of the vehicles and their contents, until a magistrate can rule on the application for a warrant. Such a constitutional requirement, this Court noted in *Arkansas v. Sanders*, imposes severe, even impossible, burdens on many police departments. See *Arkansas V. Sanders*, ___U.S.___, 99 S.Ct. at 2594 n. 14. The Court itself distinguished *Arkansas v. Sanders*, by stating that *Arkansas* requires only that a warrant be obtained before *personal luggage* is searched, and that the extent to which the Fourth Amendment applies to containers and other articles depends not upon whether they were seized from an automobile. Respondent would submit,

and apparently the Court has agreed, that the seizure of a suitcase or locked footlocker is quite different from the seizure of an automobile. See *United States v. Chadwick, supra; Arkansas v. Sanders*, ___U.S. at ___, 99 S.Ct. at 2594 n. 14.

Not all containers and packages found by police during the course of a search will deserve full protection of the Fourth Amendment. Some containers by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be opened to "plain view", thereby obviating the need for a warrant. *See Harris v. United States*, 390 U.S. 234, 236 (1968). *Arkansas v. Sanders, supra*, ___U.S.___, 99 S.Ct. at 2593 n. 13. In Petitioner's case, Agent Melton testified that by merely peering into the holes made for speakers in the back seat of the car, he could clearly view burlap sacks of the type used to transport marijuana. That fact, coupled with the odor emanating from the compartment, removed any "privacy" barriers to the subsequent search and seizure of the marijuana from the locked trunk.

Finally, Petitioner relies heavily upon *Cady v. Dombrowski*, 413 U.S. 433 (1973), as invalidating the warrantless search of his vehicle. (Brief of Petitioner at 12-13). But *Dombrowski* is inapplicable because it involved an inventory search of a type not involved in the instant case. For that reason, Respondent does not rely upon *Dombrowski* in justification of the search.

Instead, Respondent argues first that there was probable cause to arrest Petitioner and subsequently to search his automobile trunk. Second, once Petitioner's car was legitimately brought to the station house, any additional intrusion involved in simply immobilizing the car until a warrant could be obtained was no less significant than that involved in the station house search: "[T]here is little to choose in terms of practical

consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." *Texas v. White*, 423 U.S. 65, 70 (1975), *quoting Chambers v. Maroney*, 399 U.S. at 52.

Petitioner's attempt to have the Court impose the legal refinements of *Arkansas v. Sanders*, *United States v. Chadwick*, and *Cady v. Dombrowski* having no relationship to the policies underlying those decisions does not merit consideration by this Court. The search of Petitioner's locked car trunk was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

WHEREFORE, for the reasons stated above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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